

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JUNGA CHAE

Claimant

VS.

RUSSELL STOVER CANDIES, INC.

Respondent

AND

TRAVELERS INDEMNITY CO. OF AMER.

Insurance Carrier

Docket No. **1,027,589**

ORDER

Claimant requests review of the May 28, 2010 Post-Award Medical Award by Administrative Law Judge Rebecca A. Sanders. This is a post-award proceeding for medical benefits. The case has been placed on the summary docket for disposition without oral argument. The Division's Acting Director appointed E.L. Lee Kinch of Wichita, Kansas, to serve as Board Member Pro Tem in place of Carol Foreman, who retired in September 2010.

APPEARANCES

Jeff K. Cooper of Topeka, Kansas, appeared for the claimant. Brenden W. Webb of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the post-award record and adopted the stipulations listed in the Award.

ISSUES

Claimant injured her back at work on September 21, 2005, and received an award of workers compensation benefits for a 16.9 percent permanent partial general disability. Claimant now requests additional medical treatment for disabling low back pain and left leg pain. In the May 28, 2011 Post-Award Medical Award, the ALJ denied claimant's request for additional medical treatment. The ALJ reasoned:

Claimant is requesting that the Court award her medical treatment with Dr. Peloquin, specifically to authorize the implantation of a dorsal column simulator [sic]. The evidence is insufficient to relate the need for the treatment back to Claimant's injury with Respondent. When Claimant was released from treatment with Dr. Ciccarelli her pain complaints were minimal and Claimant no longer needed prescription pain medications. Now three years later Claimant feels she is in need of several prescription pain medications and a dorsal column simulator [sic] to relieve her pain. There are several intervening events since Dr. Ciccarelli released Claimant from treatment. Claimant held two jobs since her release. While Claimant was employed with Courtyard Marriott there were two work related events that required Claimant to seek medical treatment for pain in her back. One involved picking up laundry and another involved lifting and transporting a port-a-crib. These incidents caused Claimant to seek medical treatment including at least two treatments at the emergency room for pain medication injections. While Dr. Peloquin is very eloquent in his defense for Claimant's need for the dorsal column simulator [sic] he is not persuasive in relating this treatment back to the original accident with Respondent. Dr. Peloquin's opinion that it relates back to Claimant's accident with Respondent is based on no review of prior medical records including Claimant's need to seek treatment for her back due to job duties with Courtyard Marriott. For these reasons, Claimant's request for post award medical treatment with Dr. Peloquin is denied because the Court is not persuaded that the conditions that require the treatment Dr. Peloquin is recommending relates to Claimant's injury with Respondent.¹

The ALJ found claimant had failed to prove the requested medical treatment was related to her September 21, 2005 accident at work.

Claimant argues the ALJ erred as she contends her testimony, coupled with the medical opinions of Dr. Steven Peloquin and Dr. Pedro A. Murati, establish the requested pain management treatment is to relieve the natural and probable effects of her September 2005 accident. Claimant argues she has suffered continuous pain following her accident at work despite undergoing low back surgery and that the flare-ups of pain she experienced while subsequently employed as a desk clerk at both the Baymont Inn and Courtyard Marriott Hotel were merely temporary in nature and long before the September 11, 2008, regular hearing and the initial November 10, 2008 Award. Moreover, she maintains that Dr. Peloquin related her present low back pain to her September 2005 injury and that the doctor testified the requested dorsal column stimulator would definitely benefit her. She also argues that it was unnecessary for Dr. Peloquin to review her earlier medical records as the history that claimant provided to the doctor was accurate. Claimant's argument to this Board may be summarized, as follows:

Dr. Peloquin's testimony established that the most probable and reasonable solution to control this young claimant's debilitating pain is the utilization of a dorsal

¹ ALJ PAM Award (May 28, 2010) at 5.

column stimulator. Claimant submits that her need for this pain control device is the direct and natural consequence of her September 21, 2005, low back injury while employed by the respondent. Her low back injury has never fully healed and the episodes claimant has experienced since her surgery are continuing aggravations and flare-ups of claimant's initial low back injury. But for the original low back injury, claimant would not continue to have the debilitating low back pain.²

Consequently, claimant requests the Board to reverse the Post-Award Medical Award.

But respondent contends the Award should be affirmed. Respondent argues that following low back surgery by Dr. John Ciccarelli claimant was released from medical treatment in June 2007 with minimal low back pain, no radiating symptoms, no foot drag, and no restrictions. Respondent emphasizes that in October 2007 claimant was also evaluated by Dr. Pedro A. Murati, who did not recommend future medical treatment at the time. Moreover, respondent maintains that after she stopped working for respondent and after the June 2007 release from medical treatment, claimant injured her back on several occasions – in March 2008 when she fell out of bed, in July 2008 while bending over to pick up laundry at work, and in July 2008 while moving a port-a-crib at work. Finally, respondent argues that claimant should not receive a dorsal column stimulator as Dr. Ciccarelli did not believe it would be appropriate in light of claimant's diffuse symptoms.

The only issue before the Board on this appeal is whether the ALJ erred by denying claimant's request for additional medical treatment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant, who is in her early 30s, injured her low back in September 2005 while working for respondent. As a result of that injury claimant underwent low back surgery in February 2007 by Dr. John Ciccarelli, an orthopedic surgeon in Overland Park, Kansas. The initial workers compensation claim was determined in a November 10, 2008 Award in which claimant received an award for work disability benefits. The Award was not appealed.

Despite having undergone low back surgery, claimant alleges she has continued to have left leg pain, which she maintains began with the September 2005 accident. At the post-award medical hearing in August 2009, claimant rated her present low back pain and left leg pain at 8 on a 10-point scale. She further testified that this was not the first time

² Claimant's Brief at 14 (filed Jul. 19, 2010).

she had inquired about additional medical treatment as following her September 2008 regular hearing she allegedly had asked her former attorney about obtaining additional medical treatment but the attorney had declined to help.

Adding somewhat to the difficulty in this claim is claimant's return to work for other employers following her surgery only to experience increased symptoms from specific incidents at work. In addition, claimant has a history of chronic low back complaints before her September 2005 accident at work.

The medical records placed into evidence indicate claimant had chronic low back pain following a 1995 automobile accident. In January 2005 claimant was treated at Salina Regional Health Center where she reported she had experienced chronic low back pain for more than 10 years. Claimant sought medical treatment at that time because she had recently experienced a significant increase in pain. At that visit claimant also reported occasional posterior left thigh pain and occasional numbness in her left leg. Claimant was diagnosed as having low back pain/sciatica and given outpatient physical therapy.

Following the September 2005 injury at work, claimant eventually underwent low back surgery. Dr. Ciccarelli performed a laminectomy and discectomy on claimant at L4-5 in February 2007 and five months later, or in June 2007, released her from medical care without restrictions. Shortly after her medical release, claimant began working as a front desk clerk for the Baymont Hotel in Salina, Kansas. But she quit that job in early March 2008 because of back pain, which she felt was related to her work duties such as folding laundry and carrying playpens to the guests' rooms. Claimant promptly obtained a similar job at the Courtyard Marriott in Salina, Kansas, where she worked several months through approximately July 2008. Claimant similarly quit that job due to her back symptoms after the hotel began asking her to perform work that required bending and lifting.

In late 2007 and during 2008 claimant sought medical treatment for her low back symptoms at the Salina Family Health Care Center and Smoky Hill Family Medicine Residency Program. The clinic's records indicate that on December 19, 2007, claimant reported that her low back pain, which she indicated had resolved following her February 2007 surgery, had flared-up over the preceding two weeks with no inciting event, trauma, or lifting. At that visit claimant attributed her symptoms to heavy lifting she had performed for respondent.

The clinic records also indicate that claimant returned to the clinic in March 2008 after she fell out of bed and developed pain in the right side of her back. She returned to the clinic on July 7, 2008, after experiencing sharp pain in her back the day before and seeking treatment at the local hospital's emergency room. Claimant attributed her symptoms at that time to bending at the waist to pick up some laundry at work. Dr. Raul Morffi, who is a resident physician, prescribed physical therapy and increased claimant's narcotic medication.

One week later, on July 14, 2008, claimant returned to the clinic and reported back pain from moving a port-a-crib at work the night before. The clinic notes from that date also, however, indicate that claimant had chronic low back symptoms made worse by the incident at work. Moreover, those notes indicate the doctor prescribed physical therapy because of claimant's chronic low back pain and left-sided paresthesias.

On August 18, 2008, claimant reported to the clinic she had again visited the emergency room due to her back pain. The clinic notes from that date reflect that claimant had experienced low back pain since September 2005 but that she had reinjured her back in July 2008, which corresponds to the crib incident at work on July 13, 2008.

The clinic notes from August 26, 2008, indicate that claimant had experienced progressive left thigh muscle spasms since lifting a 30 pound crib at work "about 1 wk ago"³ and that she had recently quit her job at the hotel. Those notes also indicate that claimant had quit her job at the hotel because the job was becoming more demanding and that she could no longer tolerate her back and leg pain. Dr. Morffi modified claimant's medications and eventually referred her to Dr. Peloquin in Manhattan, Kansas, for pain management of her chronic low back pain.

An MRI performed in November 2008 indicated claimant had small, stable disk protrusions at L4-5 and L5-S1, with possible minimal S1 nerve root impingement bilaterally. The central canal was only mildly narrowed at the level of the focal protrusion. At L3-4 there was a small focal disk protrusion centrally without significant central canal or neural foraminal stenosis.

At Dr. Morffi's deposition, claimant attempted to get the doctor to relate her present low back symptoms to her September 2005 accident, but the doctor faltered. The doctor testified, in part:

Q. (Mr. Cooper) When you first saw her, her primary complaint was chronic low back pain with a history of an injury in 2005, and surgery for that back condition in 2007, is that accurate?

A. (Dr. Morffi) Yes.

Q. And throughout the course of your treatment of Miss Chae, did that condition remain the same? In other words, she had complaints of low back pain with the same history, chronic in nature?

A. Seems that the back pain, that she may have had more than one issue with her back pain.

³ Morffi Depo., Ex. 1.

Q. I guess what I'm asking is, she had the chronic back pain and then she would do some activity, as Mr. Webb pointed out to you, that caused a flare-up of her symptoms --

A. Um-hum.

Q. -- is that accurate, the crib, I think, and bending over with the laundry basket?

A. Yes. I don't know for sure whether one pain came from the other, it's hard for me to tell exactly.

Q. I understand. Someone has chronic back pain and a history of a prior surgery such as Miss Chae had in 2007 when you first saw her, would not be unexpected for a person with that history to have periodic flare-ups or periodic worsening and lessening of that kind of pain, would it?

A. It's possible, yes.

. . .

Q. When you referred her to Dr. Peloquin or recommended the referral to Dr. Peloquin, was it due to the chronic pain that she exhibited first in December of 2007 when you first [saw] her, as well as her condition after that?

A. Yes, I would say both.

Q. To your knowledge, did her chronic pain that she first told you about when she presented in December of 2007 ever resolve itself?

A. I don't recall for sure.⁴

The clinic's notes from August 26, 2008, under the subheading entitled Assessment reads: "low back pain nos with h/o radiculopathy" and "left thigh muscle spasm."⁵ Dr. Morffi did not indicate that his final diagnosis was different.

Dr. Peloquin, who is board-certified in anesthesiology and pain management, testified he first saw claimant in November 2008 and that he had treated claimant with epidural steroid injections, sciatic piriformis blocks, and selective nerve blocks to address the shooting pain down her legs.⁶ That treatment provided only temporary relief of the pain, which the doctor felt was coming from the nerve roots at L4, L5, and S1. Based upon

⁴ Morffi Depo. at 18-20.

⁵ *Ibid.*, Ex. 1.

⁶ Peloquin Depo. at 9.

claimant's response to the various injections, Dr. Peloquin is convinced claimant is a good candidate for a trial program with a dorsal column stimulator, assuming she would pass the required psychological evaluation. According to the doctor, 85 percent of his patients who undergo the trial program obtain sufficient pain relief that they want the permanent stimulator implanted into their back. The doctor attributes that high percentage to his ability to identify the appropriate nerve roots. He also estimates that the average level of pain relief for those patients who elect the permanent device is 70 to 80 percent and that a significant percentage of his younger patients obtain sufficient relief to be able to return to work.

Dr. Peloquin related claimant's present need for medical treatment to her injury at work and the resulting low back surgery. He testified, in part:

I base that on the history that I took from her, that she said she didn't have pain in her back of this magnitude before that accident, that her pain started with that accident, that it was dealt [with] as a work issue, it was treated as a work issue. She had surgery, she didn't have the best of outcomes with the surgery, she persisted with the pain. She actually in some instances [had] told me she thought the pain was worse after surgery in some ways and it's persisted, and she tried to work, I believe she said, for about three years after the surgery and just found the pain was overwhelming where she couldn't tolerate the work anymore. So based on that history I believe that the pain was secondary to the work injury. Someone this age you don't usually find these type[s] of degenerative changes in their spine unless something traumatic has happened.⁷

But Dr. Peloquin acknowledged that before evaluating claimant he did not have her earlier medical records.⁸ Similarly, the doctor acknowledged that he did not know that claimant had worked for two other employers following her surgery, but he was aware that she had tried to work. Further, there is no indication in the record that the doctor knew about her incidents of back pain while working as a hotel desk clerk. In short, Dr. Peloquin's opinion is based upon the limited history provided by claimant that she has experienced pain in her left buttocks and left leg pain going down into her toes since her September 2005 injury at work.

At the post-award medical hearing held in August 2009, claimant testified that her left leg pain never improved despite her February 2007 surgery. The medical records introduced at Dr. Morffi's deposition, however, that pertain to a well-woman-examination in late October 2007 state, "Back surgery – Dr. Chicarelli [sic] - pinched nerve - pain free."

⁷ *Ibid.* at 18-19.

⁸ *Ibid.* at 23.

Dr. Ciccarelli also testified in this post-award request. He stated that when he released claimant in June 2007 following surgery she had minimal complaints of some intermittent soreness in her back with increased activity. Furthermore, he thought claimant was doing very well as she was off all of her medications. Dr. Ciccarelli did not recall that claimant was having any radiculopathy at that time and his notes do not mention it. The doctor saw claimant again in September 2007, which was their last visit. Her primary complaint at that time was low back discomfort that was dependent upon her activity level. According to Dr. Ciccarelli, claimant did not complain of radicular symptoms at that time. The doctor specifically testified that claimant did not have leg pain when he evaluated claimant seven months after her surgery.⁹

After reviewing claimant's medical records from Doctors Morffi and Peloquin, Dr. Ciccarelli felt claimant might not receive much benefit from the proposed dorsal column stimulator because of the diffuse nature of her complaints and the questionable nature of the procedure. Dr. Ciccarelli further testified that he believed claimant had aggravated or strained her back in 2008 while working as a hotel desk clerk and that the dorsal column stimulator implant would not prevent such occurrences. Dr. Ciccarelli reasoned, in part:

Again, it appears from my review that, you know, she's describing episodes where she's either aggravating or straining her back doing certain maneuvers which, I mean, can happen to anyone. And these type episodes, when they occur from lifting or moving type things, again, are a risk for everyone. And, again, as far as the invasive nature and recommendation on the stimulator, I don't think that even with implanting something like that, that that would in any way prevent episodes like this from occurring.¹⁰

Dr. Ciccarelli acknowledged, however, that he was not aware how effective the injections were that Dr. Peloquin had administered. Likewise, Dr. Ciccarelli acknowledges that his specialty is orthopedics rather than anesthesiology or pain management. Indeed, Dr. Ciccarelli indicated he has not dealt with a patient that has received a dorsal spine stimulator implant for six or seven years or, in other words, since he received his spine surgery training following his residency. Moreover, since he has not seen claimant since September 2007, Dr. Ciccarelli is unable to say whether claimant now has sciatica, which he believes is one of the things that a dorsal column stimulator may be used to control, although he feels the effectiveness of that treatment is controversial.

The ALJ concluded that claimant had failed to prove her present symptoms and present need for medical treatment are related to her injury at work in September 2005. Dr. Morffi faltered when he was called upon to provide an opinion that claimant's present request for medical treatment was related to her accident at work. And it is questionable

⁹ Ciccarelli Depo. at 12.

¹⁰ *Ibid.* at 14-15.

that Dr. Peloquin knew the pertinent details in claimant's medical history to provide such an opinion. Further, contrary to claimant's testimony, the medical records indicate claimant's low back pain and left leg pain resolved following her February 2007 surgery. The Board, like the ALJ, is not persuaded that claimant has proven her present need for medical treatment is related to her September 2005 accident. Accordingly, the Post-Award Medical Award should be affirmed.

AWARD

WHEREFORE, the Board affirms the May 28, 2010, Post-Award Medical Award entered by Administrative Law Judge Rebecca A. Sanders.

IT IS SO ORDERED.

Dated this _____ day of March, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Brenden W. Webb, Attorney for Respondent and its Insurance Carrier
Rebecca A. Sanders, Administrative Law Judge